



Copyright Office

37 CFR Part 202

[Docket No. 2023-3]

Access to Electronic Works

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Copyright Office is issuing a notice of proposed rulemaking to update its regulation governing electronic deposits of published works submitted to the Office that have been selected for addition to the collections of the Library of Congress. The current regulation permits the Library to collect and provide limited on-site access to groups of newspapers electronically submitted for registration, as well as electronic serials and books submitted for mandatory deposit. The proposed rule expands the categories of electronic deposits covered by the regulation with the same limitations on access as are currently in place. The proposed changes are part of ongoing steps by the Library and the Office to encourage the submission of works in electronic form and reduce the need for copyright owners to deposit physical copies.

DATES: Written comments must be received by no later than 11:59 p.m. Eastern Time on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Reply written comments must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through

regulations.gov. Specific instructions for submitting comments are available on the Copyright Office website at <https://www.copyright.gov/rulemaking/edeposit-access>.

FOR FURTHER INFORMATION CONTACT: Rhea Efthimiadis, Assistant to the General Counsel, by email at meft@copyright.gov or telephone at 202-707-8350.

SUPPLEMENTARY INFORMATION:

I. Background

The Copyright Act provides two sources of materials that can be selected by the Library of Congress for its collections. The first is the “mandatory deposit” requirement set forth in section 407 of title 17. Under section 407, owners of copyright-protected works published in the United States must generally deposit two complete copies of the best edition of the work “for the use or disposition of the Library of Congress.”¹ “The ‘best edition’ of a work” is defined as “the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.”² The Office’s regulations, including § 202.19 and Appendix B of part 202, set forth rules and criteria for the different types of works subject to mandatory deposit.

The second source of materials is section 408, which requires applicants seeking to register the copyright in published works to provide the Office with “two complete copies or phonorecords of the best edition.”³ To avoid the duplication of deposits, section 408 specifies that copies or phonorecords deposited under section 407 “may be used to satisfy the deposit provisions” of section 408 if they “are accompanied by the prescribed application and fee.”⁴ Registration deposits are “available to the Library of Congress for

¹ 17 U.S.C. 407, 407(b).

² *Id.* at 101.

³ *Id.* at 408(b)(2). Section 408(b) also sets out the deposit requirements for the registration of unpublished works (*id.* at 408(b)(1)), works first published outside of the United States (*id.* at 408(b)(3)), and contributions to collective works (*id.* at 408(b)(4)).

⁴ *Id.* at 408(b). Although section 408 states that copies deposited pursuant to the mandatory deposit provision in section 407 may be used to satisfy the registration deposit requirement in section 408, in

its collections,” and items not selected by the Library are retained by the Office for a period of time.⁵

Both sections 407 and 408 grant the Register of Copyrights broad regulatory authority to specify the nature of the required deposits, including the ability to exempt certain works from the deposit requirements.⁶ Using this authority, the Register has permitted the deposit of only one copy instead of two for certain classes of works submitted for registration.⁷ Similarly, the Register has issued regulations exempting specific categories of works from the mandatory deposit requirements.⁸

The Office also has used its regulatory power in sections 407 and 408 to accommodate the submission of electronic deposits instead of physical deposits in certain cases. With respect to section 407, the Office issued an interim rule in 2010 generally exempting electronic works that are “available only online” from the mandatory deposit requirement, with a limited exception for electronic-only serials.⁹ The Office revised this rule in 2020 to require the mandatory deposit of electronic-only books in response to an affirmative demand under section 407(d).¹⁰ To date, the Office’s regulations for registration deposits have generally required or preferred the deposit of physical copies. Recently, however, the Office created new flexible registration options across a number of categories that either permit or require the submission of electronic copies depending

practice, the Office treats copies of works submitted for registration as satisfying the mandatory deposit requirement (assuming the deposit requirements are the same), and not vice versa. 37 CFR 202.19(f)(1), 202.20(e); see *Registration of Claims to Copyright Deposit Requirements*, 43 FR 763, 768 (Jan. 4, 1978).

⁵ 17 U.S.C. 704(b), 704(d). Deposits of works submitted under either sections 407 and 408 are “property of the United States Government” and can be used by the Library for its collections. *Id.* at 704(a), 704(b).

⁶ *Id.* at 407(c); *id.* at 408(c)(1).

⁷ 37 CFR 202.20(c)(2)(i).

⁸ *Id.* § 202.19(c) (listing “categories of material [that] are exempt from the deposit requirements of section 407”).

⁹ *Mandatory Deposit of Published Electronic Works Available Only Online*, 75 FR 3863, 3869 (Jan. 25, 2010); 37 CFR 202.19(c)(5). The interim rule codified the Office’s preexisting practice of not demanding copies of electronic-only works such as website content. See *Mandatory Deposit of Electronic Books and Sound Recordings Available Only Online*, 81 FR 30505, 30506 (May 17, 2016). Under the interim rule and current regulations, copyright owners are not obligated to deposit electronic-serials unless and until the Office affirmatively makes a demand. See 37 CFR 202.24(a).

¹⁰ *Mandatory Deposit of Electronic-Only Books*, 85 FR 71834 (Nov. 12, 2020).

on the work.¹¹ For example, in 2018, the Office issued a final rule with respect to the group registration of newspaper issues, which states that deposits “must be submitted in a digital form.”¹²

Under its current regulation, the Office places strict limits on access to electronic deposits selected by the Library of Congress for its collections.¹³ Electronic deposits received by the Library from the Office can only be accessed by specific authorized users at limited locations, and only two such users may access a particular deposit at a time. “Authorized users” are defined as (i) Members of the U.S. House of Representatives and the U.S. Senate, as well as their officers and staff, (ii) the Library of Congress’s staff and contractors, and (iii) registered researchers who are authorized to use the Library of Congress’s public reading rooms and the collections that are accessible there.¹⁴ Authorized users may access the Library’s electronic collections only on the Library’s premises at terminals connected to a secure network.¹⁵ The only exception to the on-site requirement is for Library staff, who are permitted to access electronic deposits “off-site as part of their assigned duties via a secure connection.”¹⁶ These limitations on access would not be changed by the proposed rule.

Although the Copyright Act provides that the Library may select any deposit received by the Office, current regulations authorize the Library’s acquisition of only two types of electronic deposits: those received through mandatory deposit pursuant to

¹¹ See, e.g., *Group Registration of Contributions to Periodicals*, 82 FR 29410 (June 29, 2017); *Group Registration of Photographs*, 83 FR 2542 (Jan. 18, 2018); *Group Registration of Newspapers*, 83 FR 4144, 4146 (Jan. 30, 2018); *Group Registration of Serials*, 84 FR 60918 (Nov. 12, 2019); *Group Registration of Newsletters*, 85 FR 31981 (May 28, 2020); *Group Registration of Short Online Literary Works*, 85 FR 37341 (June 22, 2020); *Liberalizing the Deposit Requirements for Registering a Single Issue of a Serial Publication*, 87 FR 43744 (July 22, 2022).

¹² 37 CFR 202.4(e)(6)(ii) (for group newspaper deposits, “[t]he issues must be submitted in a digital form, and each issue must be contained in a separate electronic file”).

¹³ *Id.* § 202.18.

¹⁴ *Id.* § 202.18(d). The process for becoming a registered researcher is available at <https://www.loc.gov/rr/readerregistration.html>.

¹⁵ *Id.* § 202.18(b); *id.* § 202.18(d) (“Authorized user” means Library of Congress staff, contractors, and registered researchers, and Members, staff and officers of the U.S. House of Representatives and the U.S. Senate for the purposes of this section.”).

¹⁶ *Id.* § 202.18(a).

section 407 and those submitted for group registrations of newspapers.¹⁷ When the regulations were enacted, technical limitations prevented the Library from selecting and transferring other types of electronic copies to its collections. As a result of technical developments since that time, the Library has systems now capable of ingesting and preserving online-only serials deposited under section 407.¹⁸ In addition, technical development of the Office’s electronic registration system (“eCO”) now provides the ability for the Library to select and transfer other electronic deposits to its collections. The Library’s selection decisions will remain limited, however, to registration deposits for group newspapers and mandatory deposits for eSerials and eBooks absent amendment of the Office’s regulations. The proposed rule will expand the electronic deposits of published works that the Library can select.¹⁹

As the Office reported to Congress in December 2022, the Library is “increasing its focus on collecting works in digital form.”²⁰ The proposed rule expands the Library’s ability to select and transfer to its collections additional categories of published works in electronic form submitted to the Office. Accordingly, it provides the regulatory authority necessary for the Library to meet this goal, while maintaining the current limits on public access to the works. Additional intended beneficiaries of the proposed rule will be those copyright owners who wish to satisfy their deposit requirements under sections 407 and 408 through the submission of electronic rather than physical deposits.

II. Proposed Rule

¹⁷ *Id.*

¹⁸ See 75 FR 3863, 3865 (explaining that “the Library is currently developing technological systems that will allow it to ingest electronic works, including those available exclusively online, and maintain them in formats suitable for long-term preservation”).

¹⁹ Neither the current regulation nor the proposed changes allow access to *unpublished* works in electronic form. See also 37 CFR 201.23 (governing the transfer of unpublished deposits to the Library of Congress, requiring the Library maintain “appropriate safeguards against unauthorized copying or other unauthorized use of the deposits which would be contrary to the rights of the copyright owner”).

²⁰ Letter from Shira Perlmutter, Reg. of Copyrights, U.S. Copyright Office, Sen. Thom Tillis, Ranking Member, S. Comm. on the Judiciary, Subcomm. on Intell. Prop. at 7 (Dec. 1, 2022) (“Best Edition Study”).

The Library and Office propose to expand the current regulations governing the transfer of electronic deposits for the Library's collections. As the Office's recent study on the best edition requirement explained, the Library has determined that in many cases its collections needs can be met using electronic deposits of textual works,²¹ and it is studying other types of works for which that is true.

A. The Proposed Rule's Expansion of Existing Categories

This Notice of Proposed Rulemaking updates the regulation governing the addition of electronic copyright deposits to the Library's collections. Specifically, the proposed rule will expand the Library's authority to select electronic deposits of published works for addition to its collections.²² This change is effected by replacing the current regulatory language limiting this authority to electronic deposits received through group newspaper registrations and mandatory deposits with language encompassing all published works covered by the following existing regulations: §§ 202.4 (d) through (g) and (i) through (k) (certain group registrations), 202.19 (deposit of published copies or phonorecords for the Library of Congress), 202.20 (deposit of copies and phonorecords for copyright registration).

The proposed rule does not alter the current strict limits on access to these works after their selection and acquisition by the Library: electronic deposits covered by the proposed rule will be available only to authorized users on the Library's premises via a secure system. Library staff will continue to have authorization for remote access, but only through a secure server and network limited to serving the Library. In all cases, access to any individual electronic deposit received under sections 407 and 408 will be limited to two simultaneous authorized users.

B. The Library's Digital Collections Strategy

²¹ *Id.* at 13.

²² The rule will not affect the Library's inability to provide public access to unpublished electronic deposits submitted to the Office for copyright registration.

As part of its Digital Collections Strategy, the Library is making a gradual shift towards an “e-preferred” approach, in which digital formats will be preferred over traditional physical formats across its major acquisitions streams, including deposits received from the Office.²³ Because of the increased prevalence of digital content, the Library’s plan encompasses “all aspects of born digital collecting and curation, end-to-end.”²⁴ This will involve policies and workflows that support digital content acquisition and curation, developing “an agile technical infrastructure [to] allow for the routine and efficient acquisition of desired digital materials,” and establishing and implementing appropriate methods to “ensure that rights-restricted digital content remains secure.”²⁵ A key component of the Library’s strategy is expanding the acquisition for its collections of digital content deposited with the Copyright Office.²⁶ But before the Library can begin to make operational changes, it must have the legal authority to do so. The Office’s proposed regulatory amendment will further this goal.

The proposed rule is designed to offer long-term benefits to the Library and its authorized users by expanding its collections of digital content. By reducing the need for physical deposits, the revised rule is also intended to benefit copyright owners. When the Library’s needs can be met with digital copies, the Office will be able to provide additional opportunities for applicants to submit electronic deposits with their registration materials.²⁷ This will lower the overall cost for applicants who would otherwise need to

²³ U.S. Library of Congress, *Digital Collections Strategy Overview 2022-2026* at 4–5 (Oct. 2021) (“Digital Collections Strategy”), https://www.loc.gov/acq/devpol/Digital%20Collections%20Strategy%20Overview_final.pdf.

²⁴ *Id.* at 1.

²⁵ *Id.* at 1–2.

²⁶ *Id.* at 4 (Library plans to “[w]ork with the Copyright Office to explore and strategically plan the possible implementation of regulatory updates” that help “[e]xpand the depth and breadth of digital content acquisition via the Copyright Office.”).

²⁷ To be clear, the Office does not plan to require applicants to submit electronic deposits. Instead, applicants will choose whether to submit an electronic or physical deposit. Applicants who prefer to submit physical copies will have the ability to do so. *See* Best Edition Study at 8 (Office plans to “provide digital options for additional types of works, although deposits in physical form will still be permitted.”).

produce and mail physical copies to the Office, and will be particularly helpful for small businesses and independent creators who may have limited resources.²⁸

In turn, the Office’s Registration Program will benefit from the expansion of copyright owners’ ability to submit electronic deposits. The Office spends significantly more time and resources to process registrations with physical deposits than those with electronic ones.²⁹ The most significant reason for this disparity is the time required to receive mailed deposits. When an application includes an electronic deposit, the Office can typically review the registration file as soon as it is assigned. But when an applicant mails physical copies, it may take weeks or longer for the deposit to reach the Office and be connected with the corresponding application.³⁰ Because the effective date of a registration is the date that the Office receives the application, filing fee, and deposit in proper form, the delay associated with physical deposits can cause copyright applicants to have an effective date much later than the date they submitted an electronic application through eCO. The proposed rule will pave the way for the Office to increase opportunities for electronic deposits, and will allow copyright owners to avoid the delays

²⁸ *Best Edition Study: Notice and Request for Public Comment*, 87 FR 33836, 33839 (June 3, 2022) (“[w]hile the submission of e-copies as opposed to print copies for purposes of registration would pose some difficulties in terms of service to Congress and other user groups, having access to e-copies of the content will be beneficial in the long term”); *see also* Best Edition Study at 5–7 (discussing Office’s efforts to reduce burden on copyright owners from compliance with the best edition requirement, particularly from submission of physical best edition copies).

²⁹ The current average processing time for registrations with uploaded digital deposits is 1.2 months if no correspondence is needed, or 3.3 months in cases of correspondence. Registrations with physical deposits are much longer—an online application with a physical deposit takes an average of 2.7 months to resolve with no correspondence or 6.6 months with correspondence. Updated registration processing times can be found on the Office’s website at <https://www.copyright.gov/registration/docs/processing-times-faqs.pdf>.

³⁰ In addition to the time consumed by mail delivery, physical deposits consume additional resources to process. Copyright deposits, like all material sent to the Capitol Complex, are first redirected offsite to be screened and decontaminated for possible pathogens. Once the deposit has been screened and delivered to the Office, the Materials Control and Analysis Division (“MCAD”) manually matches the deposit to the corresponding application. To facilitate this process, applicants are supposed to include a “shipping slip” containing a barcode generated by eCO for tracking purposes. But many applicants omit the shipping slip with their deposits, requiring MCAD to correspond with the applicant, obtain the application case number, search for the application in the electronic registration system, and manually generate a new shipping slip and barcode. Electronic deposits bypass all of these steps and avoid the rare occasions where a deposit either does not reach the Office at all or is misplaced.

caused by physical deposits and benefit from faster decisions and earlier effective dates of registration.

Finally, the rule will provide significant benefits to the Office's retention and preservation of works. Currently, the Library often acquires all physical copies of the registration deposits for its collections, and no copies are retained by the Office. If a selected work is subsequently needed in connection with litigation or another records request, the Office must seek to retrieve a copy from the Library.³¹ By contrast, digital deposits can be used by the Library for its needs without affecting the Office's records. When a digital copy of a work is uploaded into the electronic registration system, the copy automatically becomes part of the Office's administrative record. If the Library selects an electronically submitted work, the Office can retain a digital "record" copy,³² meaning that work would remain available for the applicable retention period as an Office record.³³ Digital copies are also easier to track, store, and retrieve than physical copies, allowing the Office to more readily provide a copy for use in litigation or in responding to other public records requests.

Ultimately, the proposed rule will provide significant benefits by reducing the Office's and Library's reliance on physical deposits and their accompanying logistical challenges. In addition, it will support the Library's strategic objective to "[e]xpend the depth and breadth of digital content acquisition via the Copyright Office."³⁴

C. Information Technology and Security Considerations

³¹ The Office cannot certify copies of works transferred to the Library's collection. Its regulations provide that the Office will make a certified copy of a registered work if it is needed for litigation or other legitimate purposes, provided it has retained a copy of that work. 37 CFR 201.2(d)(2). But the Office cannot issue a certified copy of a work transferred to the Library or another institution. *See* U.S. Copyright Office, Compendium of U.S. Copyright Office Practices, secs. 2405.3, 2409.5 (3d ed. 2021) ("Compendium (Third)").

³² 17 U.S.C. 704(c).

³³ The Office retains published deposit materials for a period of twenty years. Compendium (Third) sec. 1510.1 ("Published deposit materials are currently stored for twenty years."). If the Office closes a file for a published work without issuing a registration or refuses to register the work, the deposit materials are retained subject to the disposition schedules set by the National Archives and Records Administration. *Id.*

³⁴ Digital Collections Strategy at 4.

The Office recognizes that because this rule expands the Library’s authority to select and transfer to its collections electronic deposits of published works submitted for registration, copyright owners may have questions about the Library’s information technology (“IT”) security practices. The security of electronic deposits is a shared priority of copyright owners, the Office, and the Library. The Library is committed to “the need to ensure the security of the digital content in [its] care”³⁵ and takes careful steps to address concerns about the protection of electronic copyright deposits. Critically, it employs the same level of encryption to protect copyright deposits as other highly sensitive information it holds, such as congressional material.³⁶ The Office is not aware of any security threats to date with respect to the eSerials and eBooks that have been submitted for mandatory deposit. In the last decade, the Library has received tens of millions of digital files from copyright owners,³⁷ and it reports that there have been no known instances of a breach in its security or theft from its digital collections.

The Office encourages commenters to review its recent policy study on the best edition requirements, which addressed IT security concerns in connection with the storage of electronic deposits.³⁸ As that study explains, the Library has invested substantially in its IT security capacity in recent years, including centralizing IT security under a Chief Information Officer and enacting policies and practices to secure Library and Office data.³⁹ The Library also obtains ongoing public feedback on its practices in part through the Copyright Public Modernization Committee (“CPMC”) and a vulnerability disclosure program.⁴⁰

The proposed rule’s expansion of the categories of published electronic deposits that will be available for the Library’s selection, combined with the current limits on

³⁵ *Mandatory Deposit of Electronic-Only Books*, 85 FR 38806, 38812, n.88 (June 29, 2020).

³⁶ *See id.* at 38811–14 (detailed explanation of the Library’s IT security improvements and upgrades).

³⁷ Best Edition Study at 18.

³⁸ *See id.* at 16–19.

³⁹ *Id.* at 17–18.

⁴⁰ *Id.* at 19–20.

access, will not increase the risk that these deposits will be stolen or misused. Any electronic registration deposits that are added to the Library's collections will be protected by the same technical measures that currently secure 236 million electronic serials and 1.2 million e-books.⁴¹ These security measures are extensive—at a recent CPMC meeting, the Library's Chief Information Officer detailed the continuous security measures for eDeposit material. Among other steps, the data is protected both at rest and in transit, with over 300 IT security controls.⁴² These controls are subject to repeated testing per the Library's continuous monitoring schedule.⁴³

Just as with current treatment of electronic deposits, access will be restricted to authorized users as defined in the regulation and only permitted on the Library's physical premises, with a narrow exception for Library staff working offsite over a secure connection.⁴⁴ This limited onsite access for authorized users occurs through computer terminals located in the Library's reading rooms.⁴⁵ The reading room terminals are not connected to the internet, have USB and other ports disabled, and are under the supervision of Library staff.

The Library takes seriously its responsibilities as a steward of the cultural works in its collections, including safeguarding deposits received from the Office. The Office is confident that the current security measures and practices provide robust security for electronic deposits in the Library's collection. To the extent there remain comments or questions about the security of deposits, the Office is prepared to address them in the final rule.

⁴¹ *Id.* at 18.

⁴² U.S. Copyright Office, Library of Congress, *CPMC Public Meeting* (Mar. 2, 2023), <https://www.loc.gov/item/webcast-10761/>.

⁴³ *Id.*

⁴⁴ Library staff have limited offsite access to deposits “as part of their assigned duties via a secure connection.” 37 CFR 202.18(a). This allows employees working remotely to fulfill work duties but does not permit access for other purposes.

⁴⁵ *Access to Rights-Restricted Content*, Library of Congress, https://catalog.loc.gov/vwebv/ui/en_US/htdocs/help/eDepositAccess.html (Access to rights restricted content is available on dedicated Stacks terminals located in Library reading rooms.). While onsite, Library staff may also access these materials through their workstations.

III. Conclusion

As the Library implements its Digital Collections Strategy, it will increase the digital works held in its collections, including through the selection of digital deposits submitted to the Copyright Office. The proposed rule facilitates this by providing the Library the authority to select and transfer digital deposits for all types of published works submitted to the Office through the registration process. Access to these materials will remain limited and subject to the existing regulation's restrictions. These changes will help the Library fulfill its mission as the Nation's library and the research arm of Congress.

The Copyright Office welcomes public feedback and seeks comments on the regulatory amendments presented in this Notice of Proposed Rulemaking, as well as related issues discussed within.

List of Subjects in 37 CFR Part 202

Claims, Copyright.

For the reasons set forth in the preamble, the Copyright Office proposes amending 37 CFR part 202 as follows:

PART 202—PREREGISTRATION AND REGISTRATION OF CLAIMS TO COPYRIGHT

1. The authority citation for part 202 continues to read as follows:

Authority: 17 U.S.C. 408(f), 702.

2. Amend § 202.18 by:

a. In paragraph (a), removing “Access to electronic works received under § 202.4(e) and § 202.19” and adding in its place “Access to published electronic works received under § 202.4(d) through (g), § 202.4(i) through (k), § 202.19, or § 202.20”;

b. In paragraph (a), removing “only to authorized users at Library of Congress premises” and adding in its place “at Library of Congress premises only to authorized users”;

c. In paragraph (b), removing “Access to each individual electronic work received under § 202.4(e) and § 202.19” and adding in its place “Access to each individual electronic work received pursuant to paragraph (a) of this section”; and

d. In paragraph (c), removing “electronic works received under § 202.4(e) and § 202.19” and adding in its place “electronic works received pursuant to paragraph (a) of this section”.

Dated: August 24, 2023.

Suzanne V. Wilson,
General Counsel and
Associate Register of Copyrights.

[BILLING CODE:1410-30-P]

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